No. 77-1264

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

READING HOSPITAL AND MEDICAL CENTER, PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 2a) is reported at 562 F. 2d 42. The decision and order of the National Labor Relations Board (Pet. App. 3a-20a) are reported at 226 NLRB 611.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on September 16, 1978, and a petition for rehearing was denied on December 14, 1977 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act by suspending and discharging an employee because of her opposition to the termination of a training program that she and other employees believed would affect their working conditions.

STATEMENT

1. Until 1975, the petitioner hospital administered a surgical residency program.[1] The residents in the program often assisted the surgeons in operating procedures. When residents were not available, nurses known as operating room technicians were required in emergency situations to perform surgical procedures normally performed by the residents (Pet. App. 8a-9a).[2]

On January 26, 1975, a group of operating room technicians, including Sheila Rea, learned that the surgical residency program was scheduled to be terminated. Discussing the termination among themselves in the nurses' lounge, the technicians expressed concern about the effect the termination would have on their

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[1]The residency program was administered by the hospital under the auspices of a National Board composed of representatives from the American College of Surgeons, the American Board of Surgery, the Council on Medical Education, and the American Medical Association. The program had been in effect at the hospital for several years (Pet. App. 8a).

[2]Operating room Supervisory Nurse Nancy Feeg testified that "[i]n the absence of a surgical resident * * * it was sometimes necessary * * * during a surgery for [an operating room technician] to do things ordinarily done by a surgeon, including '[slipping] a catheter [and making] suture * * * if the physician's hands [were] tied up' " (Pet. App. 9a).

working conditions. Rea and others expressed the fear that the absence of surgical residents during major surgery would create situations in which they "might have to go out of the realm of nursing and enter into the realm of practicing medicine" (Pet. App. 9a). One nurse suggested that circulating a petition in the hospital might save the program. Rea stated that a letter to a newspaper might help; she added that she intended to write such a letter (Pet. App. 10a).

Later that day, Rea asked one of the surgeons in the hospital if a petition to proper authorities would help keep the program. The surgeon said he did not think it would, because in his view, the decision to end the program was not reversible. After receiving this advice, Rea neither circulated a petition nor wrote a letter to a newspaper on the subject (Pet. App. 10a). Nonetheless, Rea's statement of her intention to write a letter was reported to the hospital management, and four days later she was suspended. On February 3, the hospital's personnel director interviewed Rea for about an hour, focusing in substantial part on her discussion of the program with other nurses, on her opposition to the termination of the program, and on her previous statement that she had intended to write to a newspaper about the matter. A week later, Rea was discharged. The personnel director admitted that the decision was made in part because of her "threat to write the letter to the newspaper" (Pet. App. 14a).

2. In a decision adopted by the Board (Pet. App. 3a-4a), the Administrative Law Judge rejected the hospital's contention that Rea's activity was not protected by Section 7 of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 157. The activity was concerted, the Board concluded, because it was "engaged in by several

speakers and listeners, all of whom, including Rea, were involved in discussing the effect the termination of the program would have on their work" (Pet. App. 11a). The hospital had argued that Rea's activity was unprotected because the hospital had no control over retention of the program and its termination had no significant impact on the technicians' duties. In response, the Board ruled that neither the futility of Rea's proposed action nor any misapprehension on her part about the effect of the discontinuance of the program removed her conduct from the protection of Section 7 of the Act (Pet. App. 12a).[3] Accordingly, the Board concluded that by suspending and discharging Rea, petitioner violated Section 8 (a)(1) of the Act, 29 U.S.C. 158(a)(1). The Board ordered that Rea be reinstated with back pay (Pet. App. 18a-19a).

The court of appeals enforced the Board's order without opinion (Pet. App. 2a).

ARGUMENT

1. Contrary to petitioner's assertion (Pet. 13) this case is not one in which the object of the protest was unrelated to the employees' working conditions. The Board found that Rea and her fellow technicians were concerned about the effect of the termination of the program on their work when they discussed the possibility of taking action to

[3]The Board also rejected the hospital's assertion that the discharge was motivated by its reasonable fear that Rea intended to disparage the hospital in her letter to the newspaper. The hospital relied on Rea's comments, made during the January 26 discussion with the other nurses, that the hospital was a "G.D. place" and a "terrible place to work." The Board noted that Rea's comments were made in private and that there was "no evidence showing that Rea intended to include them in the letter she said she would write to the newspaper. Nor is there any evidence establishing how Rea would have couched her letter had it actually been written" (Pet. App. 16a).

attempt to reverse the termination decision (Pet. App. 8a-9a). The credited evidence shows that their concern was reasonably grounded, because the technicians could be called upon to perform certain procedures that would otherwise be performed by a resident if one were in attendance (*ibid.*). Similarly, while the hospital might have had no control over the termination of the program (Pet. 13), it certainly had control over whether the technicians would be called upon to perform more work when the residency program was terminated, and it was therefore in a position to respond to their concerns. Accordingly, the Board properly concluded that Rea's group discussion of the termination of the residency program, including her proposal to write a letter to a newspaper concerning the matter, was "concerted [activity for] * * * mutual aid or protection," within the meaning of Section 7. This conclusion is in accord with settled principles,[4] and presents no issue warranting review by this Court.[5]

2. Contrary to petitioner's contention (Pet. 5-6), the issue in this case is not the same as that presented in *Eastex, Inc.* v. *National Labor Relations Board,* No. 77-453, argued April 25, 1978. The issue in that case is whether Section 7 affords employees the right to distribute on company property union literature that has

[4]See *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 16; *Walls Manufacturing Co.*, 137 NLRB 1317, enforced, 321 F. 2d 753 (C.A. D.C.), certiorari denied, 375 U.S. 923; *Ben Pekin Corp.*, 181 NLRB 1025, enforced, 452 F. 2d 205 (C.A. 7).

[5]Petitioner also contends (Pet. 13-14) that Rea's activity was unprotected under the principle enunciated in *National Labor Relations Board* v. *I.B.E.W. (Jefferson Standard Broadcasting),* 346 U.S. 464, because it amounted to disloyalty. As noted above, the Board properly rejected this contention since the record did not show that petitioner had reasonable grounds to believe that any letter sent by Rea would have disparaged the Hospital.

no direct bearing on the particular employees' working conditions and that calls for political action on their part. The activity for which Rea was disciplined directly concerned her working conditions and those of her fellow employees; it was not political in nature; and it did not involve distribution of literature on the employer's property.

Other cases cited by petitioner (Pet. 8-12) are similarly distinguishable. In *G & W Electric Specialty Co.* v. *National Labor Relations Board*, 360 F. 2d 873 (C.A. 7), for example, the court held that an employer could legally discharge an employee for circulating a petition relating to a dispute among officials of the employee credit union. The court found that the interest of the employees in the operation of the credit union "was one arising from their status as borrowers or depositors-investors" and "was not an interest derived from their status as Company employees * * *." 360 F. 2d at 876. Similarly, in *National Labor Relations Board* v. *Bretz Fuel Co.*, 210 F. 2d 392 (C.A. 4), the court held that an employer could permissibly discharge an employee because of his involvement in an unauthorized strike that was in breach of the union contract, on the ground that his conduct did not constitute protected concerted activity. Finally, the discharges in *National Labor Relations Board* v. *Leslie Metal Arts Co., Inc.*, 509 F. 2d 811 (C.A. 6), arose from a work stoppage resulting in part from a purely personal quarrel among the employees. The court stated that a work stoppage "directed at circumstances other than conditions of employment" and "arising from purely personal quarrels unrelated to labor disputes with an employer" would not be protected by concerted action. 509 F. 2d at 813, 814. Nonetheless, the court in that case granted the Board's petition for enforcement on the ground that the walkout was conducted in part to protest

the employer's failure to protect employees from physical violence from other employees. *Id.* at 814.

On the narrow question presented by this case, there is therefore no conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
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